80-2030

No.

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In the Supreme Court of the United States

October Term, 1980

REDERIAKTIEBOLAGET GUSTAF ERIKSON AND CONSOLIDATED BATHURST LIMITED,
Petitioners,

vs.

OBBIE MALLARD AND DAISY MALLARD, HIS WIFE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

The question presented is whether a shipowner and time-charterer is required to continuously inspect the stowage and dunnage used therein of the loading and discharging stevedore when there is no evidence that the vessel owner could not reasonably believe that any defects that existed would be discovered by the stevedore in order to avoid liability to their longshore employees under the negligence standard of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §905(b).

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OBBIE MALLARD AND DAISY MALLARD, HIS WIFE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on January 15, 1981, as to which rehearing was denied on February 20, 1981.

OPINIONS BELOW

The opinion and order of Judge James Lawrence King, Judge of the United States District Court for the Southern District of Florida, is not officially reported but is set forth in the Appendix, pages A1 through A4, *infra*.

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported. A copy of the opinion is set forth in the Appendix, pages A5 through A23, *infra*. The order of the Court of Appeals denying the petition for rehearing is not reported but is set forth in the Appendix, page A24, *infra*.

JURISDICTION

On January 15, 1981, the Court of Appeals entered its judgment reversing the decision of the District Court granting the petitioners' summary judgment motion. A petition for rehearing was timely filed on January 28, 1981, and was denied on February 20, 1981. The jurisdiction of this court is invoked under 28 U.S.C. section 1254(1).

STATUTE INVOLVED

Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, 33 U.S.C. §905(b):

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such

person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

Plaintiff is a longshoreman who filed this action alleging diversity jurisdiction of the United States District Court for the Southern District of Florida to recover damages for a personal injury which he sustained aboard the M/V "GERMUNDO".

The M/V "GERMUNDO" was a Finnish flag vessel owned by Rederiaktiebolaget Gustaf Erickson (hereinafter referred to as ERIKSON) and time-chartered to Consolidated Bathurst Limited (hereinafter referred to as CBL). The Plaintiff was employed by Lavino Shipping Company (hereinafter referred to as LAVINO).

On July 21, 1975 Plaintiff was injured while driving a forklift in a hold of the M/B "GERMUNDO" during the discharging of the vessel in Port Everglades, Florida. The forklift overturned when one of its wheels either broke through a plywood walking board or the walking board gave way and allowed the wheel to slip into a large void between the stow of the rolls of newsprint.

Plaintiff alleges ERIKSON and CBL were negligent in providing a ship with a cargo that was improperly stowed and providing defective walking boards.

For the purpose of this writ, we will adopt the Court of Appeals statement of the facts as undisputed.*

The "GERMUNDO" was engaged in the trade of regularly carrying cargoes of newsprint between Canada and Florida ports. The vessel was loaded by a stevedoring company, Aluminum Company of Canada (hereinafter referred to as ALCAN). Under its agreement with ALCAN, CBL provided the plywood walking boards used by ALCAN in loading the vessel. CBL also assumed general responsibility for the condition of and undertook inspection of the plywood. Each board was inspected by ALCAN as it was laid and any boards which the stevedore determined to be damaged were discarded and were replaced with new plywood.

On the return voyage to Canada, the ship's crew would inspect the plywood walking boards and throw all the defective ones overboard. This examination constituted the extent of the vessel owner's responsibility for the walking boards.

We will assume for purposes of this appeal that prior to the accident on a previous voyage or voyages a representative of LAVINO had complained to the ship's officers that the stow was not tight enough and that dangerous holes were left behind the rolls. (A5 through A15)

The Court of Appeals in reversing the summary judgment of the trial court, held that there was an issue of fact as to whether or not the walking boards were, in fact, defective; whether that defect was open and obvious or latent and whether the vessel owner had knowledge of the dangerous condition of the stow.

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*Were the case to be tried, the petitioners would contest the Court of Appeals' findings in several instances but this does not effect the issues before this Court.

We would submit for purposes of this appeal that it would make no difference whether the plywood was or was not defective, openly or latently. We would further submit that knowledge of the shipowner of the past dangerous stowage is immaterial as to the proper application of the law.

REASONS FOR GRANTING THE WRIT

The Writ of Certiorari should be granted because the Court of Appeals has applied principles of law governing the vessel owner and charterer's responsibility to a longshoreman who is an employee of an independent stevedoring company that are in conflict with this Court's findings in *Scindia v. de los Santos,* ..... U.S. ..... (1981), Case No. 79-512.

IMPORTANCE OF QUESTIONS

This Court is completely knowledgeable of the legislative background to the 1972 amendments to the Longshoremen's and Harbor Workers' Act. As this Court recognized in *Scindia, supra,* at page 12, the Congress of the United States attempted to establish a new standard of care for the vessel owner which would make it liable only for those conditions which were caused by his negligence and put an end to "holding a shipowner solely liable for conditions that are attributable to the stevedore rather than the ship."

The Court of Appeals in its decision in the case sub judice would do exactly that which Congress intended to prevent and do that which this Court in *Scindia, supra,* has pronounced against.

In the *Scindia* decision, *supra*, at page 15, the Court has stated that the vessel owner's duty of reasonable care under the circumstances as,

> ". . . the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore." * * *
>
> "The shipowner, within limits is entitled to rely on the stevedore, and owes no duty to the longshoremen to inspect or supervise the cargo operations."

If the law is as stated by the Court of Appeals, we are faced with a situation of a vessel owner whose sole obligation under a charter party was to present the vessel for loading and discharge at alternate ports, being required to supervise the stowage and placement of every roll of newsprint and every walking board loaded because he was told by a discharging stevedore that on several prior voyages the stow had not been as tight as it should have been, creating a dangerous condition.

The decision of the Court of Appeals denies the shipowner and time charterer the right to rely on an expert stevedore to perform its responsibilities and duties in a reasonably safe manner in loading and discharging cargo.

It is most important in this case to keep in mind that the discharging stevedore was the party who originally discovered and complained of the dangerous condition created by the loading stevedore.

The effect of the decision of the Court of Appeals is to hold this vessel owner and/or charterer responsible for an injury resulting from acts of one stevedore which the other stevedore had reason to know of yet did not protect its employee.

The record is totally silent of any evidence which would indicate to the charterer or vessel owner that the discharging stevedore having knowledge of a dangerous condition would not take the necessary precautions to protect its employees.

If the discharging stevedore believed that the stow was unsafe either by virtue of spaces between the rolls or because of defective plywood, it would be in the best position to inspect the plywood as its employees would be working on it and would be able to look under the walking boards if they suspected that it was improperly laid over the rolls of newsprint or that unreasonably large spaces existed beneath it.

As we read this Court's holding in *Scindia*, it would not require the vessel owner to have mates in each hold to inspect and supervise the stowage of each roll of newsprint and condition of each piece of dunnage during each loading and before turning the ship over to the discharging stevedore.

The concurring opinion of Justice Powell holds, at page 1,

> "Although the shipowner cannot rely in all cases on the judgment and primary responsibility of the stevedore concerning what conditions allow safe work to continue, safety is a 'matter of judgment committed to the stevedore in the first instance.' Id., at 18. Only where the judgment of the stevedore is 'obviously improvident', ibid., and that this poor judgment is known to the shipowner or reasonably should be anticipated under the circumstances, does a shipowner have a duty to intervene."

We would submit that there is nothing in this record from which a jury could conclude that the judgment of the

stevedore was obviously improvident and that this poor judgment was known to the shipowner or reasonably should be anticipated.

We would submit further that the issue of whether or not walking boards were defective is not truly a material issue in view of the Court's decision in *Scindia*. If the walking boards were latently defective, then the vessel owner or charterer would have no responsibility because they could not be reasonably expected to discover it. If they were obviously defective, then they could rely first on the loading stevedore to discover it and replace it, and that failing, could rely on the discharging stevedore to discover the defect and replace it.

CONCLUSION

For the foregoing reasons we would respectfully submit that this Court should grant a Writ of Certiorari to review the decision of the Court of Appeals.

Respectfully submitted,

JAMES L. HURLEY
Attorney for Petitioners

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 76-692-CIV-JLK

OBBIE MALLARD, et al.,
Plaintiffs,

v.

THE M/V GERMUNDO, et al.,
Defendants.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND ORDER OF DISMISSAL

This matter arose upon the motion of the defendants, Rederiaktiebolaget Gustaf Erikson, individually and as Claimant owner of the vessel, and Consolidated Bathurst Ltd., for summary judgment. After carefully reviewing the record, the court concludes that the motion should be granted.

The plaintiff-longshoreman seeks to recover damages for injuries he sustained in the course of discharging cargo from the defendant, M/V Germundo. The undisputed facts reveal that the M/V Germundo was time chartered by the defendant, Consolidated Bathurst, Ltd., for the purpose of shipping newsprint from Port Alfred, Quebec, Canada, to Port Everglades, Florida. Consolidated hired an independent stevedoring contractor, Aluminum Company of Canada, Ltd., for the purpose of loading the newsprint onto the M/V Germundo at Port Alfred. The newsprint in question was stowed in hold number one, on

its end, three tiers high. On the third tier from the deck a double layer of plywood walking boards was placed by the loading stevedore's employees, and additional roles of newsprint were then stowed on this plywood 'tween deck. There is evidence that defective plywood was used to form this 'tween deck. The plywood used on this vessel had been purchased by Consolidated for the use of the loading stevedore. The necessary boards were kept on board the vessel, and the remainder were stored on shore, in a shed owned by Consolidated. If a stevedore thought a particular board needed to be replaced, he would advise Consolidated, and a new board would be supplied.

After the vessel was loaded with newsprint, it journeyed to Port Everglades, Florida, where the cargo was discharged by Lavino Shipping Co. At this time, the plaintiff, Obbie Mallard, was employed by Lavino as a longshoreman. His job, at the time of the injury in suit, was to operate a forklift on the plywood 'tween deck. During the course of discharging cargo from the 'tween deck, the forklift broke through the plywood and fell into a two foot gap between the lower stacks of newsprint. The plaintiff was injured as a result of this fall. The plaintiff alleges that this fall was caused by the use of defective plywood to form the 'tween deck, and/or by the improper loading of the newsprint, which resulted in the gap. The plaintiff has produced evidence to support both of these contentions.

In their motion for summary judgment, the defendants contend that they cannot be liable for damages caused by the use of defective plywood or improper loading because there is no evidence that they knew or reasonably should have known of the dangerous condition that was created thereby. Therefore, the defendants contend that

they cannot be found negligent for failing to take corrective action or warn the discharging stevedore of this condition.

In opposition to this motion, the plaintiff contends that the defendants had a duty to supervise the stowage of cargo, and that in fulfillment of this duty the defendants reasonably should have known of the dangerous condition. Therefore, the plaintiff asserts that the failure to warn or take corrective action constitutes negligence on the part of the defendants. In support of its position, the plaintiff has produced expert and other testimony to the effect that the crew of the vessel has a duty to supervise the stevedore's loading and unloading operations.

The court cannot agree with the position of the plaintiff. The evidence indicates that the stevedores had full responsibility and control over the stowage and discharge of the cargo, and that neither the time charterer nor the ship's crew were involved in these operations. There is no evidence to the contrary. To impose liability under the plaintiff's theory would be to return to the concept of absolute liability under the doctrine of unseaworthiness. Congress abolished this doctrine in the 1972 Amendments to the Longshoremen and Harbor Workers Compensation Act, 33 U.S.C. §905(b), and turned instead to the use of land-based principles of negligence. *See Brown v. Mitsubishi Shintaku Ginko,* 550 F.2d 331 (5th Cir. 1977); *Gay v. Ocean Transport & Trading, Ltd.,* 546 F.2d 1233 (5th Cir. 1977). The imposition upon the vessel or charterer of a non-delegable duty to supervise the work of a stevedore is inconsistent with those principles. Here, where the charterer hired a stevedore to stow the cargo, and the stevedore was given exclusive control over the loading operations, the duty to load properly and to discover and remedy a dangerous condition caused by improper stowage was the responsibility of the stevedore.

Neither the vessel nor the time charterer can be negligent for the breach of this duty, which under these facts was owed solely by the stevedore. *Citizen v. M/V Triton*, 384 F. Supp. 198 (E.D. Tex. 1974). Therefore the court does

ORDER AND ADJUDGE that final summary judgment is entered in favor of the defendants Rederiaktiebolaget Gustaf Erikson, individually and as Claimant owner of the M/V Germundo, and Consolidated Bathurst Ltd. It is further

ORDERED AND ADJUDGED that this case is dismissed with prejudice.

DONE AND ORDERED in chambers in Miami, Florida, this 30th day of March, 1979.

/s/ James Lawrence King
James Lawrence King
United States District Judge

cc: George P. Telepas, Esq.
William B. Milliken, Esq.
Reginald M. Hayden, Jr., Esq.

APPENDIX B

Obbie MALLARD and Daisy Mallard,
his wife, Plaintiffs-Appellants,

v.

ALUMINUM COMPANY OF
CANADA, LTD. et al.,
Defendants-Appellees.

Obbie MALLARD, Plaintiff,
Daisy Mallard, his wife,
Plaintiff-Appellant,

v.

The M/V "GERMUNDO", a Finnish flag vessel, her engine, tackle and appurtenances, etc. In Rem; Rederiaktiebolaget Gustaf Erikson and Consolidated-Bathurst Limited, In Personam, Defendants-Appellees.

Obbie MALLARD and Daisy Mallard,
his wife, Plaintiffs-Appellants,

v.

The M/V "GERMUNDO," etc., et al.,
Defendants-Appellees.

Nos. 79-1095, 79-1847 and 79-1922
United States Court of Appeals,
Fifth Circuit.

Jan. 15, 1981.

Three actions were brought to recover for injuries which longshoreman sustained when forklift which he was using to unload cargo of newsprint tipped over because of allegedly defective stowage of the cargo. Consolidated appeals were taken from orders of the United

States District Court for the Southern District of Florida, James Lawrence King, J., dismissing loading stevedore and granting summary judgment for the vessel, its owners, and charterer. The Court of Appeals, Henderson, Circuit Judge, held that: (1) the loading stevedore, a Canadian corporation, was not subject to in personam jurisdiction under that provision of Florida long-arm statute designed to reach out-of-state manufacturer in products liability actions; (2) land-based negligence standard was properly applied as regards claims asserted against time charterer and vessel owner under 1972 Amendments to Longshoremen's and Harbor Workers' Compensation Act; and (3) whether plywood board which gave way, causing forklift to tip, was obviously or latently defective was an issue to be resolved before the proper standard by which to assess liability of owner and charterer could be ascertained.

Affirmed in part, reversed in part, vacated in part, and remanded.

1. Federal Courts (Key) 75

Each federal court is empowered to utilize the jurisdictional statutes of the state in which it presides; however, the court's authority is limited to the scope of the statute even if it does not reach as far as federal due process allows. West's F.S.A. § 48.193.

2. Courts (Key) 12(2)

Florida long-arm statute requires more activities or contacts to sustain personal jurisdiction than demanded by the Constitution. West's F.S.A. § 48.193.

3. Courts (Key) 12(2)

Language setting forth the contacts required by long-arm jurisdictional statutes must be strictly construed.

4. Federal Courts (Key) 76

Provision of Florida long-arm statute applicable where products, materials or things processed, etc., or manufactured by defendant are used or consumed in the state and such use or consumption results in injury is intended to reach out-of-state maunfacturers in products liability action and did not embrace Canadian stevedore's alleged negligent loading and storage of newsprint so as to subject stevedore to in personam jurisdiction of Florida courts in action to recover for injuries which longshoreman sustained while off loading the cargo. West's F.S.A. § 48.193(1)(f).

5. Shipping (Key) 84(1)

The 1972 amendments to Longshoremen's and Harbor Workers' Compensation Act granting a right of action to longshoremen injured by negligence of "vessel" includes recovery for an act or omission of the time charterer as well. Longshoremen's and Harbor Workers' Compensation Act, § 5(b) as amended 33 U.S.C.A. § 905(b).

See publication Words and Phrases for other judicial constructions and definitions.

6. Shipping (Key) 50

Generally, a time charterer, one who has no control over the vessel, assumes no liability for negligence of the crew or unseaworthiness of the vessel absent a showing that the parties to the charter intended otherwise.

7. Shipping (Key) 50

Although provision of time charterer whereby charterers would provide necessary dunnage and shifting boards might impose on the charterer the financial responsibility to provide dunnage of the necessary quality without placing on him the obligation to pay damages for personal injury that the dunnage might cause, liability could not, in any

case, be transferred to the time charterer unless the vessel owner, which remained responsible for navigation and all other matters, originally had responsibility. Longshoremen's and Harbor Workers' Compensation Act, § 5(b) as amended 33 U.S.C.A. § 905(b).

8. Shipping (Key) 84(1)

Land-based negligence standard was applicable in determining liability of vessel owner and time charterer for injuries which off loading longshoreman sustained because of alleged improper storage of cargo of newsprint. Longshoremen's and Harbor Workers' Compensation Act, § 5(b) as amended 33 U.S.C.A. § 905(b).

9. Shipping (Key) 84(1)

Land-based negligence standard applicable under 1972 Amendments to Longshoremen's and Harbor Workers' Compensation Act bifurcates into two levels of vessel owner responsibility which correspond to whether the risk-fraught condition is latent or obvious. Longshoremen's and Harbor Workers' Compensation Act, § 5(b) as amended 33 U.S.C.A. § 905(b).

10. Shipping (Key) 84(1, 5)

A shipowner need not answer in damages to a longshoreman employed by an independent stevedore which has complete charge and control of an unloading operation and is aware of hazards unknown to the officers or crew of the vessel and if either the stevedore or his employee is in a better position to appreciate fully the obvious risk and avoid the danger, particularly where danger is within the control of the stevedore's own employees, the vessel owner will not be liable. Longshoremen's and Harbor Workers' Compensation Act, § 5(b) as amended 33 U.S.C.A. § 905(b).

11. Shipping (Key) 84(1)

To enable a vessel owner to insulate himself from liability to a longshoreman for injuries sustained because of obvious defects by agreeing to relinquish control of the work area to the stevedore would thwart Congress' intent under 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act to retain a negligence action against the vessel owner. Longshoremen's and Harbor Workers' Compensation Act, § 5(b) as amended 33 U.S.C.A. § 905(b).

12. Shipping (Key) 84(1)

Fact that the hazard-causing injury is open and obvious to the stevedore in control of operations will not absolve the vessel owner of responsibility if the owner should anticipate the harm despite such obviousness of the defect and still fails to correct it. Longshoremen's and Harbor Workers' Compensation Act, § 5(b) as amended 33 U.S.C.A. § 905(b).

13. Shipping (Key) 84(1)

Where the hazard is latent and unobvious, the stevedore's control over loading or discharge is less relevant to his liability to an injured longshoreman because he is in no better position to know of the risk than the vessel owner and, in such situations, knowledge of the owner, rather than control of the stevedore, should be the focus of inquiry. Longshoremen's and Harbor Workers' Compensation Act, § 5(b) as amended 33 U.S.C.A. § 905).

14. Shipping (Key) 84(3¼)

A shipowner is subject to liability to an injured longshoreman only if he knows or has reason to know of an unreasonably dangerous condition of the vessel of which the longshoreman is probably not aware and fails to exercise

reasonable care to make the condition safe or warn longshoreman. Longshoremen's and Harbor Workers' Compensation Act, § 5(b) as amended 33 U.S.C.A. § 905(b).

15. Shipping (Key) 84(2)

Under 1972 Amendments to Longshoremen's and Harbor Workers' Compensation Act a shipowner's liability is not based solely on actual knowledge of a hazard and failure to correct or warn; however, liability extends to those dangerous conditions of which the owner has actual notice plus those of which he should have notice by exercise of reasonable care with meaning of "reasonable care" being adduced in light of the special problems arising during the carriage of goods by sea. Longshoremen's and Harbor Workers' Compensation Act, § 5(b) as amended 33 U.S.C.A. § 905(b).

See publication Words and Phrases for other judicial constructions and definitions.

16. Shipping (Key) 84(2)

The "reasonable care" standard of shipowner liability to injured longshoremen does not include the duty to actively supervise loading work, but if there is evidence that ship's crew has conducted an inspection which either led to the discovery of a perilous condition, the vessel owner may be negligent. Longshoremen's and Harbor Workers' Compensation Act, § 5(b) as amended 33 U.S.C.A. § 905(b).

17. Shipping (Key) 84(5)

Whether plywood boards, which were laid over cargo of newsprint and one of which gave way causing forklift to tilt and injure off-loading longshoreman, were obviously or latently defective was an issue to be resolved before the proper standard by which to assess liability of time charterer and vessel owner could be ascertained; if the

boards were obviously hazardous, owner and charterer could be absolved of liability if the evidence demonstrated that the discharging stevedore in control or the injured longshoreman was in a better position to appreciate fully the hazard and avoid the danger so that the owner had no reason to anticipate harm. Longshoremen's and Harbor Workers' Compensation Act, § 5(b) as amended 33 U.S. C.A. § 905(b).

18. Federal Courts (Key) 766

Function of Court of Appeals on appeal from summary judgment is not to resolve factual issues.

19. Shipping (Key) 84(3)

Actual notice of inadequate loading, i.e., prior notice that newsprint on earlier voyages were stowed in a dangerous fashion, would prompt a reasonable person to make periodic inspections during future operations so that he might have knowledge of storage conditions and failure to inspect would constitute negligence and any hazardous condition would be those of which the vessel "should have known" for purpose of liability of owner to off-loading stevedore who was injured because of allegedly improper storage. Longshoremen's and Harbor Workers' Compensation Act, § 5(b) as amended 33 U.S.C.A. § 905(b).

Appeals from the United States District Court for the Southern District of Florida.

Before HENDERSON, POLITZ and WILLIAMS, Circuit Judges.

HENDERSON, Circuit Judge:

These are three consolidated appeals[1] arising from injuries sustained by the appellant, longshoreman Obbie Mal-

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1. No. 79-1095, *Mallard v. Aluminum Co. of Canada, Ltd.*; No. 79-1922, *Mallard v. M/V Germundo*; and No. 79-1847, *Mallard v. M/V Germundo.*

lard, in a forklift accident while he was discharging cargo on the M/V Germundo in Port Everglades, Florida. Obbie Mallard and his wife Daisy Mallard appeal from an order dismissing the loading stevedore, Aluminum Company of Canada, Ltd. (hereinafter referred to as ALCAN), for lack of personal jurisdiction. They also appeal from an order granting summary judgment in favor of the vessel, its owner, and its charterer. Daisy Mallard appeals the order dismissing her claim for loss of consortium.[2]

The M/V Germundo was owned by Rederiaktiebolaget Gustaf Erikson (hereinafter referred to as ERIKSON), a Finnish corporation, and time-chartered to consolidated Bathurst, Ltd. (hereinafter referred to as CBL), a Canadian corporation, for the purpose of carrying newsprint from Port Alfred, Quebec, Canada, to Port Everglades, Florida, and Miami, Florida. CBL hired ALCAN as stevedore for the loading operations in Canada. ALCAN stevedored the vessel for a two-year period, from 1974 to 1975, during which time the vessel continuously ran cargos loaded with newsprint between Canada and one of the two Florida. ports. On this particular voyage the discharging stevedore was Lavino Shipping Company (hereinafter referred to as LAVINO).

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2. At oral argument, the parties agreed that the consortium question was answered by *American Export Lines, Inc. v. Alvez*, ... U.S. ....., 64 L.Ed.2d 284, 100 S.Ct. 1673 (1980) *affirming Alvez v. American Export Lines, Inc.*, 46 N.Y.2d 634, 415 N.Y.S.2d 979, 389 N.E.2d 461 (1979). In *Alvez* the United States Supreme Court held that the spouse of a harbor worker injured while serving a vessel in territorial waters had an action for loss of the spouse's society. This court has indicated that *Alvez* will apply retroactively. In a *per curiam* opinion in *Blanchard v. Teledyne Movible Offshore, Inc.*, 612 F.2d 971 (5th Cir. 1980), the court set aside the judgment dismissing a claim for loss of consortium and remanded in light of the fact that certiorari had been granted in *Alvez*. Similarly, the judgment dismissing Daisy Mallard's claim should be vacated and the cause remanded for disposition in accordance with the *Alvez* opinion.

Newsprint is packed in tiers, with rolls "nested" end to end to produce the tightest stow possible. Discovery shows that on the subject voyage the newsprint was stored in this customary manner. The newsprint was stacked three tiers high. Then a double layer of plywood walking board was laid over the newsprint in a criss-cross fashion, one layer extending fore and aft and one layer abeam the vessel. This plywood formed a solid, level surface across which forklift trucks could maneuver while loading the next layers of newsprint and a surface upon which more newsprint could be stowed. After the hold was filled, the final tier of newsprint was squared into the space of the hatch by lowering the necessary number of rolls through the hatch opening.

Under its agreement with ALCAN, CBL provided the plywood walking boards used by ALCAN in loading the vessel. CBL also assumed general responsibility for the condition of and undertook inspection of the plywood. On return voyages to Canada, the ship's crew would conduct a routine inspection of the plywood and throw all worn or defective plywood overboard, but this examination constituted the extent of the shipowner's responsibility for the walking boards. Each board was further inspected by ALCAN as it was laid and any boards which the stevedore determined to be damaged were discarded and replaced with new plywood.

According to the chief mate's deposition, ALCAN's stevedoring personnel were actually in charge of getting the cargo into the M/V Germundo and properly stowed. The mate testified that he exercised no authority over the method by which the cargo was loaded or discharged, and that his concern was to insure that the cargo was loaded so as to be secure during the sea voyage. Ship's officers were not assigned to each hatch during the loading

operation, nor were officers sent into the holds to look for damage to or correct improper stowage of cargo.

There is conflicting testimony on whether objections to the manner in which ALCAN loaded the newsprint had been lodged with the vessel owner prior to Mallard's accident. The chief mate said no one representing Florida's discharging longshoremen had reported instances of improper stowage to him. Yet a LAVINO employee stated that the vessel had received warnings previously that unless a tighter stow were achieved dangerous voids would occur.

At the time of his injury, Mallard was discharging cargo in Hold No. 1 of the M/V Germundo, the hold closest to the bow of the vessel. Several longshoremen testified that Hold No. 1 is a more dangerous hold within which to work because its peculiar configuration makes a uniformly tight stow difficult. The tier of newsprint squared in the hatch of Hold No. 1 had already been removed at the time of Mallard's injury. He was operating his forklift atop the plywood walking boards in the center of Hold No. 1. He had removed one roll of newsprint and was backing away from the tier, when the plywood beneath the right wheel of the forklift either broke or gave way. The wheel slipped into an unusually large void beneath the newsprint rolls stowed below, and the forklift toppled on its side, pinning Mallard underneath and so seriously injuring his lower torso that he will probably be permanently confined to a wheelchair. The vessel's chief mate was unable to relate the circumstances of the accident. Neither he nor the other ship's officers were supervising the discharge operations at Hold No. 1.

Mallard brought suit against ALCAN, and against ERIKSON and CBL, for negligence in permitting old, worn out plywood to be used and in ignoring the presence of

unreasonably large voids between the newsprint rolls in Hold No. 1. Mallard stated that the boards appeared to be "in good condition for working on." Other members of the LAVINO crew, however, characterize the condition of the boards as "old and worn out," "thin, real thin," "frazzled" and "rotted." The void was almost uniformly described as being at least one and a half feet by two feet in area, as opposed to the average gap of approximately six inches. It was hidden from view by the plywood boards. All deponents agree that Mallard was operating the forklift in a careful fashion; contributory negligence is not an issue.

[1-4] In response to ALCAN's motion to dismiss, Mallard asserted that the federal district court could exercise personal jurisdiction over ALCAN in Canada via the Florida Long-Arm Statute.[3] The district court, however, dismissed Mallard's suit against ALCAN in its entirety for lack of personal jurisdiction over ALCAN and we affirm that decision. Each federal court is empowered to utilize the jurisdictional statutes of the state in which it presides. *Gordon v. John Deere Co.*, 466 F.2d 1200 (5th Cir. 1972); *Woodham v. Northwestern Steel & Wire Co.*, 390 F.2d 27 (5th Cir. 1968). *See generally*, 2 Moore's Federal Practice ¶ 4.41-1[3], at 4-666 (2d Ed. 1979). The court's authority is limited, however, to the scope of the state's statute, even if it does not reach as far as federal due process allows.

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3. Fla.Stat.Ann. §§ 48.193(1)(b), .193(1)(f) (West 1973). Section 48.193(1)(b) addresses circumstances in which an act within the state causes injury within the state. This section has been broadly construed by this court in instances where the tortious activity was the sort to which a precise situs cannot be designated. *Bangor Punta Operations, Inc. v. Universal Marine Co., Ltd.*, 543 F.2d 1107 (5th Cir. 1976), *Rebozo v. Washington Post Co.*, 515 F.2d 1208 (5th Cir. 1975). The facts here may be distinguished from those present in *Bangor Punta* and *Rebozo*. Although the vessel's situs was continually shifting from Canada to Florida and all points in between, the negligence clearly occurred in Canada.

Florida's Long-Arm Statute, in relevant part, exerts jurisdiction over any nonresident who causes injury to persons or property in Florida by act or omission in another state, if products that the non-resident processed, serviced or manufactured cause injury during use or consumption in Florida. Florida state courts have repeatedly held that the Florida statute requires more activities or contacts to sustain personal jurisdiction than demanded by the Constitution. *Youngblood v. Citrus Associates of the New York Cotton Exchange, Inc.*, 276 So.2d 505 (Fla. 4th Dist. Ct.App.1973). *See Escambia Treating Co. v. Otto Candies, Inc.*, 405 F.Supp. 1235 (N.D.Fla.1975). Furthermore, language setting forth the contacts required by long-arm jurisdictional statutes must be strictly construed. *American Baseball Cap, Inc. v. Duzinski*, 308 So.2d 639 (Fla. 1st Dist. Ct.App.1975). In light of these considerations, we hold that the Florida statute, Fla.Stat.Ann. § 48.193(1)(f)(2) (West 1973), is intended to reach out-of-state manufacturers in products liability actions. Where, for example, a car has been repaired out-of-state and some time later the repairs fail during an in-state sojourn causing injury, personal jurisdiction over the out-of-state repairman is concededly present under this statute. *Jack Pickard Dodge, Inc. v. Yarbrough*, 352 So.2d 130 (Fla. 1st Dist.Ct.App. 1977).[4] But the statutory language cannot be so expansively read as to embrace ALCAN's activity in the instant case. ALCAN merely loaded a vessel. The stevedoring company did not service a product in any common sense understanding of the phrase. Nor was Obbie Mal-

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4. Application of the statute must still meet "traditional notions of fair play and substantial justice," however. *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 102 (1945). Because Jack Pickard Dodge Inc. did not engage in business in Florida and its only connection with the state was the servicing of the car which was eventually operated within the state, the long-arm statute was unconstitutional as applied to it. 352 So.2d at 133.

lard "using" or "consuming" either the vessel or its newsprint.

[5-7] We next address the Mallards' appeal from the summary judgment granted by the district court in favor of ERIKSON and CBL. Under the 1972 Amendments to the Longshoremen and Harbor Workers Compensation Act, 33 U.S.C.A. § 905(b) (1978), a longshoreman is entitled to recover damages for those injuries caused by the negligence of the vessel.[5] The district court concluded that ALCAN, as loading stevedore, had full responsibility and control over the stowage of the newsprint, and that neither

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5. Section 905(b) granting a right of action to longshoremen injured by negligence of the "vessel" includes recovery for an act or omission of the time charterer as well. *Migut v. Hyman-Michaels Co.*, 571 F.2d 352 (6th Cir. 1978). Generally, however, a time charterer, one who has no control over the vessel, assumes no liability for negligence of the crew or unseaworthiness of the vessel absent a showing that the parties to the charter intended otherwise. *Habrat v. United States*, 310 F.Supp. 618 (W.D.Pa. 1970), *Klishewich v. Medterranean Agencies, Inc.*, 302 F.Supp. 712 (E.D.N.Y.1969). The CBL charter states that although it is a nondemise charter under which the owners "remain responsible for the navigation of the vessel, insurance, crew, and all other matters, same as when trading for their own account," the "charterers are to provide necessary dunnage and shifting boards . . ." and the "charterers are to load, stow and trim and discharge the cargo at their expense under supervision of the captain . . . ." *D/S Ove Skou v. Hebert*, 365 F.2d 341, 451 (5th Cir. 1966), *cert. denied* 400 U.S. 902, 91 S.Ct. 139, 27 L.Ed.2d 139 (1970), cited by appellees, holds that the third cited clause makes a charterer responsible for the costs of cargo handling, but in and of itself does not transfer operational responsibility from the owner. (Compare *Fernandez v. Chios Shipping Co., Ltd.*, 542 F.2d 145 (2d Cir. 1976) which upheld an indemnity claim by the vessel owner against the time charterer on the basis of this provision where the cause of the personal injury was directly related to loading or discharging cargo.) In light of *Skou*, this circuit seems reluctant to find any shift of operational responsibility for personal injuries to the time charterer absent clear language to that effect. Thus, the second clause enumerated may impose on the charterer the financial responsibility for providing dunnage of the necessary quality without placing on him the obligation to pay damages for personal injury that the dunnage may cause. *See generally, Wyche v. Oldendorff*, 284 F.Supp. 575 (E.D.Va. 1967). In any case, liability cannot be transferred to the time charterer unless the vessel owner originally had responsibility.

CBL, as time charterer, nor ERIKSON, as vessel owner and employer of her crew, had a duty growing out of these operations. To hold the charterer or vessel owner liable under 33 U.S.C.A. § 905(b) (1978) for negligent failure to correct the dangerous stowage condition as one of which he should have known, said the court, would portend a return to absolute liability under a negligence standard akin to the doctrine of unseaworthiness which Congress sought to abolish by the 1972 amendments.[6] Instead, the district court adopted a § 905(b) standard of care defined by land-based principles of negligence, in light of which it held that only the loading stevedore was negligent, for only he had a duty to discover and remedy perilous situations caused by improper stowage.

[8] We endorse the district court's use of the land-based negligence standard. In *Gay v. Ocean Transport & Trading Ltd.*, 546 F.2d 1233 (5th Cir. 1977), this circuit adopted as its § 905(b) negligence prototype the Restate-

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6. Section 905(b) reads:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreeemnts or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permited if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was empolyed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

33 U.S.C.A. § 905(b) (1978).

ment (Second) of Torts §§ 343, 343A (1965) which set forth the duties owed by possessors of land.[7] *Gay* concluded that the Restatement (Second) provision satisfied the several policy considerations that motivated the 1972 amendments by encouraging vessel owners to promote safety or suffer liability for their negligence and by placing the employee injured aboard a vessel in the same position he would occupy if he were injured ashore during nonmaritime employment. Cases in this circuit follow § 343 and § 343A with unerring consistency. *Roberts v. Andrew Martin Sea Services, Inc.*, No. 78-2219, slip op. at 5992, ... F.2d ..... (5th Cir., May 30, 1980); *Stockstill v. Gypsum Transportation*, 607 F.2d 1112 (5th Cir. 1979), *app. pending* 49 U.S.L.W. 3119 (Aug. 26, 1980); *Wiles v. Delta Steamship Lines, Inc.*, 574 F.2d 1338 (5th Cir. 1978); *Samuels v. Empresa Lineas Maritimas Argentinas*, 573

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7. These sections, under the title on the special liability of possessors of land to invitees, provide:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts § 343 (1965).

> (a) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.
>
> (2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated. Restatement (Second) of Torts § 343A (1965).

F.2d 884 (5th Cir. 1978), *cert. denied* 443 U.S. 915, 99 S.Ct. 3106, 61 L.Ed.2d 878 (1979); *Briley v. Charente Steamship Co., Ltd.*, 572 F.2d 498 (5th Cir. 1978); *Brown v. Mitsubishi Shintaku Ginko*, 550 F.2d 331 (5th Cir. 1977); *Lemon v. Bank Lines Ltd.*, 449 F.Supp. 1016 (S.D.Ga.1978).

[9-12] Our negligence standard as expressed in the Restatement (Second) bifurcates into two levels of vessel owner responsibility which correspond to whether the risk fraught condition is latent or obvious. Cases in this circuit which address responsibility for injury arising from obviously dangerous situations turn on the issue of control. To be extracted from these cases is the general pronouncement that the shipowner need not answer in damages to "a longshoreman employed by an independent stevedore which had complete charge and control of the unloading operation and was aware of hazards unknown to the officers or crew of the vessel." *Lemon*, 449 F.Supp. at 1020. If "either the stevedore or his employee is in [a] better position to appreciate fully the [obvious] risk and avoid the danger, particularly where the danger is within the control of the stevedore's own employees," the vessel owner will not be liable. *Stockstill v. Gypsum Transportation*, 607 F.2d at 1117. To enable the vessel owner to insulate himself from liability for obvious defects by agreeing to relinquish control of the work area to the stevedore, however, would thwart Congress' intent to retain a negligence action against the vessel owner. *Lopez v. A/S D/S Svendborg*, 581 F.2d 319 (2d Cir. 1978). The fact that the hazard-causing injury is open and obvious to the stevedore in control of operations will not absolve the vessel owner of responsibility if the vessel owner "should anticipate the harm despite such . . . obviousness [of the defect]" and still fails to correct it. *See Gay v. Ocean Transport & Trading Ltd.*, 546 F.2d at 1242; Restatement (Second) of Torts § 343A (1965).

[13-16] Where the hazard is latent and nonobvious, the stevedore's control over loading or discharge is less relevant because he is in no better position to know of the risks than the vessel owner. In such situations, knowledge of the vessel owner, rather than control of the stevedore, should be the focus of inquiry. In defining the scope of what the vessel owner "should know," we remain cognizant of Congress' abolition of longshoremen's actions based upon unseaworthiness. Congress did not intend that the vessel owner be charged with knowledge of any latent defect on the vessel, since such a theory of liability would approach the unseaworthiness standard. Because it was concerned that courts might continue to hold vessels strictly liable for hazards by viewing any unseaworthy conditions as negligence, Congress stressed that negligence should be determined by traditional non-maritime standards. The Restatement (Second) criteria of negligence subject a shipowner to liability only if he knows or has reason to know of an unreasonably dangerous condition on the vessel of which the longshoreman is probably not aware and fails to exercise reasonable care to make the condition safe or warn the longshoreman.[8] As explained in *Slaughter v. Ronde*, 390 F.Supp. 637 (S.D.Ga.1974), *aff'd*, 509 F.2d 973 (5th Cir. 1975), where a longshoreman was injured by shifting cargo, Congress, through passage of the 1972 Amendments, did not intend to derogate from the maritime law imposing liability on a vessel owner whose officers "see or have actual visual notice of, or ample time to observe, unsafe stevedoring operations" and do not take corrective action. 390 F.Supp. at 640. Heretofore, precedent in this circuit has required a showing of a real opportunity for knowledge to be gained during reasonably careful operation of the vessel before it is said that a vessel owner "should have known" of a nonobvious hazard

8. *Id.*

posing danger to longshoremen engaged in stevedoring activities.[9]

[17-19] As a matter of law, the applicable negligence standard, be it focused on control of the stevedore or knowledge of the vessel owner, is contingent upon whether a hazard is obvious or latent. The deposition testimony is replete with glaring contradictions as to the plywood's condition. The boards are at once described as "in good

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9. The appellees would have us hold that shipowner liability could only be based on actual knowledge of a hazard and failure to correct or warn. Under this approach, a vessel owner who was not reasonably observant and did not actually learn of the defect would benefit from his inattentiveness by avoiding liability. A shipowner's liability clearly must extend to those dangerous conditions of which he has actual notice plus those of which he should have notice by an exercise of reasonable care. The meaning of "reasonable care" within the shipping industry must be adduced in light of the special problems arising during the carriage of goods by sea. The reasonable care standard does not include the duty to actively supervise loading work. *Price v. S. S. Yaracuy*, 378 F.2d 156 (5th Cir. 1967). *Slaughter v. Ronde* states, "Reasonable care does not require ship's officers to inspect each hold daily to be sure that the 'stevedore has properly performed the work which it was hired to perform and that they inspect so thoroughly that they discover a danger which is not readily apparent and which is not appreciated by the longshoremen themselves.'" 390 F.Supp. 637, 644 (S.D.Ga.1974) *aff'd*, 509 F.2d 973 (5th Cir. 1975) (quoting *Williams v. Bowring Steamship Co.*, 1772 AMC 890, 897 (D.Conn.1972). But if there is evidence that the ship's crew has conducted an inspection which either led to or should have led to the discovery of a perilous condition, the vessel owner may be negligent. *Samuels v. Empresa Lineas Maritimas Argentinas*, 573 F.2d 884 (5th Cir. 1978), *cert. denied* 443 U.S. 915, 99 S.Ct. 3106, 61 L.Ed.2d 878 (1979). *Cf. Slaughter v. Ronde, supra* (no actual supervision, therefore no liability, even though master of the vessel had final say-so as to cargo location and either he or crew could complain of unsafe loading practices). The Second Circuit searches for evidence of knowledge in cases of injury by nonobvious hazards also. *See Ruffino v. Scindia Steam Navigation Co.*, 559 F.2d 861 (2d Cir. 1977), *Munoz v. Flota Merchante Grancolombiana, S.A.*, 553 F.2d 837 (2d Cir. 1977). *Ruffino* held generally that a shipowner cannot be liable for a nonobvious dangerous condition created by the independent stevedore, unless he has actual or constructive knowledge of it. Specifically, the court concluded that the shipowner was entitled to a directed verdict because there was no evidence it had actually supervised minute details of the loading operation or that it was required to do so in such a way that it would have gained knowledge of the hazard.

condition" and as "old and worn out." Consequently, the appearance of the plywood walking boards in the present case is an issue of fact. Whether the boards were obviously or latently defective must be resolved before the proper standard by which to assess liability can be ascertained.[10] For this reason we find that summary judgment is inappropriate here. *See Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967 (1944).

Therefore, we affirm the dismissal for lack of personal jurisdiction of the claims against ALCAN in No. 79-1095. We reverse the summary judgment in favor of ERIKSON and CBL and remand in No. 79-1922 for further proceedings consistent with this opinion. We vacate the judgment denying Daisy Mallard's suit for loss of consortium in No. 79-1847 and remand for disposition in accordance with the *Alvez* decision.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED.

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10. If the boards were obviously hazardous, ERIKSON and CBL may be absolved of liability if the evidence demonstrates that LAVINO, the stevedore in control, or Mallard was in a better position to appreciate fully the hazard and avoid the danger so that the vessel owner had no reason to anticipate harm. *Stockstill v. Gypsum Transportation*, 607 F.2d at 1117, Restatement (Second) of Tort § 343A (1965). On the other hand, if the boards appeared to be sturdy and sound, judgment in favor of ERIKSON and CBL may not be justified if it is shown that the vessel owner had actual or constructive knowledge of the latent condition. No evidence of actual knowledge of danger by the shipowner has been advanced by the Mallards. However, they have produced testimony by several longshoremen that the vessel had been warned that newsprint on earlier voyages was stowed in a dangerous fashion. Such actual notice of inadequate loading would prompt a reasonable person to make periodic inspections during future operations so that he might have knowledge of stowage conditions. The failure to inspect would constitute negligence and any hazardous conditions would be those of which the vessel "should have known." The vessel's chief mate gave conflicting testimony that the discharging stevedores had never notified him of stowage problems from previous voyages. Since our function is not to resolve the factual issues, however, we do not decide which version is correct. *United States v. Diebold*, 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962).

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

NO. 79-1922

OBBIE MALLARD and DAISY MALLARD, his wife,
Plaintiffs-Appellants,

versus

THE M/V "GERMUNDO", ETC., ET AL.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

ON PETITION FOR REHEARING

(February 20, 1981)

Before HENDERSON, POLITZ and WILLIAMS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

(Illegible)

United States Circuit Judge

Office-Supreme Court, U.S.
FILED
SEP 2 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-2030

in the Supreme Court of the United States

OCTOBER TERM, 1980

REDERLAKTIEBOLAGET GUSTAF ERIKSON AND CONSOLIDATED BATHURST LIMITED,
Petitioners,

vs.

OBBIE MALLARD AND DAISY MALLARD, HIS WIFE,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PREFACE TO "QUESTION PRESENTED"

Respondents cannot accept the "Question Presented" as set forth by Petitioners for the reason that it fails to properly address the findings of the Fifth Circuit. There was never any question raised as to a "continuous" inspection of the cargo during loading and no question raised as to "continuous" inspection of the dunnage used. The Fifth Circuit made no findings as to any "continuous" inspection being required.

The "Question Presented" improperly seeks a general review of the merits of this case, which the Fifth Circuit remanded for a trial on the facts and merits.

Further, there is no conflict in the findings of the Fifth Circuit with this Court's findings in *Scindia v. de los Santos*, 101 U.S. 614, (1981), Case 79-512.

RESPONDENTS' STATEMENT OF THE CASE

Basically, Respondents agree with the Petitioners' statement of the case except as hereafter set forth.

There is no question that the foreign loading stevedore was negligent in creating and leaving a large void space between the rolls of newsprint at the time of loading. There is a question as to whether the ship's officers, through reasonable, customary inspection should have discovered and corrected the condition which the discharging stevedore could not detect or discover through reasonable inspection. The dangerous condition developed at a foreign loading port while the loading was under the supervision of the ship's officers. It is submitted

that a reasonable, customary inspection at that time should have discovered and corrected the conditions which the discharging stevedore could not detect. At issue is what type of reasonable inspection must ship's officers conduct at a foreign loading port to protect a discharging stevedore who is totally unaware of dangerous conditions which existed and which caused serious injuries.

Regarding the question of the condition of the walking boards, it is submitted that the ship's crew had a duty to inspect them by reasonable, customary inspections and replace any dangerous or defective boards. Petitioner admits that an examination by the crew on the return voyage to Canada constituted the extent of the vessel owners' inspection of the walking boards.

Petitioner claims that prior knowledge of the shipowner of past dangerous stowage is immaterial. We disagree. We submit this knowledge places a higher degree of care on the vessel. We further note that Petitioner makes no mention in its statement of facts of the ". . . unusually large void . . ." between rolls of newsprint which was

> ". . . at least one and a half feet by two feet in area, as opposed to the average gap of approximately six inches. It was hidden from view by the plywood boards. . ."

as set forth in the Fifth Circuit's Opinion.

RESPONDENTS' ARGUMENT OPPOSING PETITION FOR A WRIT OF CERTIORARI

1. There is no conflict in the *Scindia* holding and the Fifth Circuit decision in *Mallard*. Further, there is no conflict between the Circuits on the holdings in these cases.

Scindia dealt with the question of malfunctioning ship's gear and the respective duties of the shipowner vis a vis the discharging stevedore. The shipowner could be liable if it had actual knowledge of winch problems or if it knew the winch was defective from the outset. At issue in *Scindia* was the question of the respective duties once the cargo operation begins and the shipowner learns, or should know, of a dangerous condition which exists.

Should the shipowner have intervened if it knew the winch problem created a clearly unsafe condition? This question was left for determination by a jury since there was a material question of fact raised as to whether the shipowner had actual knowledge of a defect or should have known of the defect from the outset of operations.

Mallard deals with a loading stevedore in a foreign port creating large holes or gaps between stowed rolls of newsprint and then covering them with plywood supplied by the vessel and its time charterer. There is a question of fact as to the unsafe condition of the plywood since it gave way when a forklift passed over it when discharging cargo in a U.S. port.

Can a foreign, loading stevedore be assumed to have the knowledge and expertise of a U.S. stevedore? It is submitted that the intent of Congress was not to deprive an injured longshoreman of a negligence claim against a vessel which was improperly loaded in a foreign port due to improper or inadequate supervision of the ship's officers.

Petitioner is saying that the ship's officers need not inspect while cargo is being loaded in a foreign port because they can totally rely on the loading stevedore to do it safely and they then cannot be charged with any form of negligence.

We submit they overlook Sec. 343 of the Restatement (Second) of Torts (1965) where the shipowner would be liable if he:

> (a) knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

Here the condition was not open and obvious. It was in effect, a trap created by the shipowner which directly caused injury to an innocent discharging

longshoreman. Here the injured person and his employer were clearly not in a position to discover the danger.

As the Fifth Circuit pointed out in its opinion:

> "... Where the hazard is latent and nonobvious, the stevedore's control over loading and discharge is less relative because he is in no better position to know of the risks than the vessel owner. In such situations, knowledge of the vessel owner, rather than control of the stevedore, should be the focus of inquiry. ."

The Fifth Circuit appropriately pointed out that Congress through passage of the 1972 Amendments, did not intend to derogate from the maritime law imposing liability on a vessel owner whose officers

> ". . . see or have actual visual notice of or ample time to observe, unsafe stevedoring operations . . ."

and do not take corrective action. *Slaughter v. Ronde*, 380 F.Supp. 637 (S.D. Ga., 1974), aff'd 509 F.2d 973 (CA5 1975).

Further, there may be circumstances where it would not be reasonable for the shipowner to assume that the stevedore will correct a problem. If the shipowner should anticipate the stevedore will not, or cannot, correct the danger and that the longshoremen cannot avoid it, then the shipowner's duty is triggered to take steps, reasonable in the circumstances, to eliminate or neutralize the hazard. See *Evans v. S.S. Campeche*, 639 F.2d 848, (CA2, 1981).

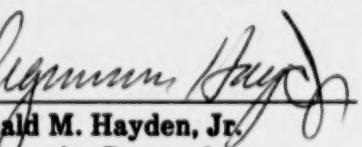
Such is the situation here. A vessel owner cannot be rewarded for its officers' inattentiveness. If the inattentiveness is unreasonable, then he should bear the consequences.

CONCLUSION

Based on the foregoing, the Petition for Certiorari should be denied.

Respectfully submitted,

LAW OFFICES OF
REGINALD M. HAYDEN, JR., P.A.

By: 
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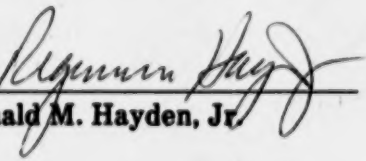
I CERTIFY that three copies of this Brief were mailed to JAMES L. HURLEY, ESQUIRE, FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A., Attorneys for Petitioner, 25 West Flagler Street, Miami, Florida 33130, this 1 day of Sept, 1981.


Reginald M. Hayden, Jr.